

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

TONAWANDA COKE CORPORATION

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Criminal No. 10-cr-219-WMS-HKS

SENTENCING MEMORANDUM
ON BEHALF OF TONAWANDA COKE CORPORATION

Defendant Tonawanda Coke Corporation (“Tonawanda Coke” or “the Company”) stands convicted of, and accepts responsibility for, environmental offenses under the Clean Air Act (“CAA”) (by emitting coke oven gas through a pressure relief valve (“PRV”) and by operating the quench towers without baffles) and the Resource Conservation and Recovery Act (“RCRA”) (relating to its handling of coal tar sludge and coal tar, including material which was stored in the Barrett Tanks and had been abandoned by prior historic owners of the property prior to 1978). Unlike the manner in which the government has portrayed the facts and circumstances of this case, Tonawanda Coke is not a rogue company whose operations are inherently criminal, and which should face a corporate death penalty when this Court imposes sentence. Instead, Tonawanda Coke is an industrial company with a long, and well-deserved, reputation with New York state regulators as operating one of the “cleanest [coke batteries] in the country,”¹ and is committed to improving its environmental regulatory compliance program. To that end, the company has invested more than \$11 million over the past three years to address not only the issues raised by the charges in this case, but also the issues raised by United States

¹ See Summary of Statements made by retired New York State Department of Environmental Conservation (“NYS DEC”) Regional Air Engineer and Regional Solid and Hazardous Materials Engineer Henry Sandomato (Exhibit 1).

Environmental Protection Agency (“US EPA”) and state regulators in several parallel civil and administrative enforcement actions.²

In this memorandum, we will describe the positive attributes of Tonawanda Coke, an employer of approximately 120 workers in Erie County, New York, and one of only four major domestic foundry coke producers left in the United States, and discuss the mitigating factors that should be considered in determining an appropriate sentence in this case. Tonawanda Coke stands ready to accept its punishment in this case, a punishment which should be sufficient, but not greater than necessary, to serve the purposes of sentencing. In this case, such a punishment should include a reasonable fine (substantially below the statutory maximum fine) which, when considered with the costs of the remedial measures already taken, and those to be taken, along with the likely parallel civil fines and penalties, can be paid by Tonawanda Coke without jeopardizing its ability to continue to operate and provide jobs for its workers and products for its customers.

I. **BACKGROUND OF TONAWANDA COKE CORPORATION**

A. **The Site on Which Tonawanda Coke Operates**

In 1917, the first coke battery began to operate at the site located at 3875 River Road, which ultimately became Tonawanda Coke. That first coke battery processed different grades of coal, crushed the coal into a very fine consistency, heated it for periods of between 17 to 28 hours at temperatures in excess of 2,000 degrees Fahrenheit, and then cooled it with thousands of gallons of water to produce foundry and furnace coke. In addition to producing coke, this battery provided gas for lighting and heating for those in the community and to fuel foundries that made steel and iron products. Later, this coke battery supported the success of the General Motors

² See Declaration of Rick W. Kennedy, ¶¶ 24-32, Exhibit A, (Exhibit 2).

Tonawanda Engine Plant. Over the last 35 years, customers used this coke to make automobiles, heavy equipment, trucks, sewers and other types of pipes, and municipal castings and manhole covers. In addition to these traditional manufacturing uses, customers also used coke in the mineral-wool and sugar beet industries.

In the late 1970s, while the facility was under the ownership of Allied Chemical Corporation, a storage tank collapsed on the site triggering a fire that almost destroyed the coke plant. In 1978, Tonawanda Coke Corporation acquired these assets from Allied Chemical Corporation and resumed operations at the facility. The plant is situated on more than 100 acres. The facility has one coke battery with a total of 60 ovens. Because the ovens must be kept hot at all times, the plant operates 365 days a year, 24 hours a day and employs approximately 120 workers.

B. Regulatory/Compliance History of Tonawanda Coke

As the evidence at trial demonstrated, there were regular onsite inspections by New York State Department of Environmental Conservation (“NYS DEC”) inspectors during the 1980s and 1990s. In 1981, Tonawanda Coke entered into a consent order with NYS DEC identifying the terms by which it would comply with more vigorous environmental emission control regulations than what was required at the time. In 1993, Tonawanda Coke adopted US EPA’s more stringent Method 303 for monitoring coke oven emissions, including the regular use of daily inspections by third-party certified testers,³ and received the necessary permits from the NYS DEC to operate under the New York Environmental Conservation Law. And, for more than 13 years, there were no violations of the daily air emission limits, despite regular inspections by NYS DEC and daily third-party monitoring of emissions. See Presentence Investigation Report (“PSR”) at

³ The US EPA has set forth the requirements of Method 303 at the following website address: <http://www.epa.gov/ttn/emc/promgate/m-303.pdf>.

¶ 59. In 1994, Tonawanda Coke self-reported a heat stack issue to NYS DEC, demonstrating again its commitment to working with environmental regulators to find solutions to any issues that it faced. *Id.*

Contrary to the government's characterizations throughout this case, Tonawanda Coke was not an irresponsible operator that ignored its environmental obligations. Rather, Tonawanda Coke earned a reputation among state regulators as an excellent coke battery operator which was responsive to environmental compliance issues when raised by the regulators.⁴ During an internal discussion with NYS DEC personnel in early 2010, retired NYS DEC Regional Air Engineer and Regional Solid and Hazardous Materials Engineer Henry Sandonato expressed his view that the management of Tonawanda Coke had demonstrated that they knew how to operate a clean coke battery going back over the last 30 years. Mr. Sandonato had no reason to be anything but completely candid during this discussion with his NYS DEC colleagues, and he stated without ambiguity that after Tonawanda Coke acquired the coke battery from Allied Chemical, the management of Tonawanda Coke "made it the cleanest [coke battery] in the country." *See* Exhibit 1. In addition, retired Principal Environmental Engineering Technician Gary Foersch, the longest tenured NYS DEC inspector of the Tonawanda Coke facility in connection with CAA compliance issues, advised the NYS DEC representatives in early 2010 that Mark Kamholz and the senior management of the Company had been very cooperative with

⁴ That positive reputation also was known to others in the industry. Due to the technical knowledge and experience of Tonawanda Coke's management, other coke plant operators, including, Empire Coke Co., previously located in Holt, Alabama, have asked Tonawanda Coke to assist in shutting down their plants when that became necessary. While assisting in these shutdowns, the Tonawanda Coke personnel worked carefully to avoid the possibility of explosion that exists when decommissioning a coke battery. Similarly, Tonawanda Coke has earned a reputation for integrity and good character with its vendors, long-time auditors/accountants, safety/insurance consultants, and a local banker. A number of these companies have written letters of reference to the Court attesting to the good character and integrity of Tonawanda Coke, and those letters are attached collectively as Exhibit 3.

NYS DEC and were consistently responsive in addressing environmental compliance issues whenever they were identified. *Id.*

Similarly, Tonawanda Coke has earned a reputation with its union (United Steelworkers Local 44475) and employees for being a safe, well-run company. In 2012, Tonawanda Coke operated for 365 days without a lost work day due to work-related injuries/illnesses. *See* State of the TCC Safety Program, dated January 24, 2013 (Exhibit 4). And, in 2012, there were only five OSHA reportable incidents representing a recordable rate of 3.47%, a rate significantly below the industry standard of 6.3%. *Id.* For the past eight years, Tonawanda Coke also has operated with quality management systems certified (and subject to periodic audits) under the guidelines of the American National Standard/International Organization for Standardization (ISO 9001:2008). *See* Explanation and Purpose of the Tonawanda Coke Quality System, dated July 31, 2013 (Exhibit 5). Tonawanda Coke's quality systems include a continuous improvement component as required by the ISO standard. Throughout the course of the year, there is a management review process to assess performance metrics, projects, customer, and vendor feedback. As part of the required periodic audits, third party testers check for adherence to, and the effectiveness of, the quality systems. To maintain its certification, Tonawanda Coke must continuously look for possible ways in which processes may have changed, evolved, or improved to benefit both workers and the quality and consistency of the product.

Consistent with this positive corporate history, the evidence at trial showed that the NYS DEC inspectors were willing to work with Tonawanda Coke to address their regulatory compliance concerns. In fact, as shown at trial, the NYS DEC had issued an exemption for baffles in the western quench tower at the plant, conditioned on a limitation of use for that tower. While the trial evidence showed that, during a brief period in 2008 when the eastern quench

tower was not in operation, the Company used the western quench tower more than anticipated when it originally obtained the exemption, nonetheless, the jury returned not guilty verdicts on four counts that related to the absence of baffles in the western quench tower. Similarly, the trial evidence showed that for 20 years prior to the return of the Indictment in this case, the NYS DEC inspectors were aware of, and did not object to, the Company's placement of coal tar sludge on the coal piles in the coal fields before the materials were recycled into the coke ovens. And, in the summer of 2009, after an accidental fire which occurred during the decommissioning of the Barrett Tanks (which Tonawanda Coke inherited from the prior owners of the site), state regulators were told expressly that the Company intended to recycle a quantity of the tar from the Barrett Tanks in the same manner and they raised no objections or concerns. While these facts do not absolve Tonawanda Coke of responsibility, they do demonstrate that Tonawanda Coke is a company that has dealt candidly with the NYS DEC inspectors and is a company that can and will learn from this experience and fully comply with the environmental laws and regulations in the future. We urge this Court to take these additional mitigating factors into account when determining the appropriate sentence.

II. **REMEDIAL ACTIONS**

Rather than ignoring the regulators' concerns, Tonawanda Coke has spent more than \$11 million over the past three years to address, and intends to commit more money to continue to address, the concerns raised by the US EPA and NYS DEC since 2009.⁵ See PSR at ¶¶ 99-102. Before the return of the Indictment in this case, Tonawanda Coke remediated the conditions and

⁵ The excavation and remediation of the area around the former Barrett Tanks involved only \$2.8 million of that total. This is the only expense that would arguably relate to "clean-up activity" associated with any of the counts of conviction. Based on the information developed during the excavation and remediation, it was apparent that the vast majority of the leakage of the tar-like material from the tanks was historic in nature and occurred prior to Tonawanda Coke's acquisition of the facility.

changed the practices that formed the bases for the criminal charges. Similarly, since 2009, Tonawanda Coke has worked closely with its outside environmental regulatory counsel and outside professional environmental engineers to resolve the requests by US EPA and NYS DEC for facility and operations modifications. Tonawanda Coke also made personnel changes to ensure that co-defendant and Tonawanda Coke's former Manager of Environmental Compliance, Mark L. Kamholz, is no longer responsible for daily oversight and control of the Company's environmental compliance activities. Lastly, the Company is committed to resolving the outstanding issues raised by US EPA and NYS DEC, including the installation of a new bag house, a component designed to control emissions from the push side of the ovens, the installation of which will require a substantial capital investment.

Specifically, with respect to the issue of the PRV which formed the basis for Counts 1 through 5 of the Indictment, Tonawanda Coke made the decision independently to cap the valve permanently once the Company understood that the regulatory agencies had concerns about it, which was prior to the issuance of any notice of violation or compliance order from either NYS DEC or US EPA. While Tonawanda Coke acknowledges that it did not list this PRV in its Title V operating permit application, the Company did specifically list the PRV, and identified its location on the coke oven gas line in the by-products unit, in a Hazardous Air Pollutant Emission Inventory submitted to the NYS DEC in 2004 and later forwarded to the US EPA. Further, as explained at trial, because the PRV was located downstream of the light oil recovery process in the by-products unit, any coke oven gas emitted through the PRV was largely stripped of the chemical components listed as hazardous air pollutants, including benzene, at least until that system was shutdown in November 2008. Finally, as a long term resolution of this issue and to

better control the coke oven gas pressure, Tonawanda Coke spent close to \$200,000 to install a new flare stack on the coke oven gas line in the by-products area.

With respect to the baffles which formed the bases for Counts 6 through 15 of the Indictment,⁶ in late 2009 and early 2010, Tonawanda Coke spent \$75,000⁷ to install baffles on both the eastern and western quench towers. In considering the relative severity of this violation, it is important to note that Gary Foersch testified at trial that he did not believe baffles to be a significant pollution control device under the facts of this case. Foersch's testimony at trial also demonstrated that the quench tower baffles simply were not an enforcement priority for him during his regular inspections at the facility. While Tonawanda Coke acknowledges that baffles should have been re-installed in the eastern quench tower, the low level of prior regulatory interest in the baffles generally coupled with the Company's prompt remedial efforts once a notice of violation was issued, both of which occurred prior to the Indictment, should be considered as mitigating factors.

With respect to the recycling of the coal tar sludge and coal tar, which formed the bases for Counts 18 and 19, Tonawanda Coke immediately stopped mixing the material on coal piles in the coal field and began mixing on a concrete pad as soon as it was requested to do so by NYS DEC and US EPA. As explained at trial, all of the RCRA regulatory and expert witnesses acknowledged that the regulations provided an exclusion for the recycling of coal tar sludge into

⁶The jury returned not guilty verdicts on Counts 6, 7, 8, and 10 relating to the lack of baffles on the western quench tower for which NYS DEC granted an exemption from the baffle requirement subject to certain use limitations. The jury returned a guilty verdict on Count 9 relating to the western quench tower and Counts 11 through 15 relating to the eastern quench tower.

⁷ Court's Exhibit 4 filed during the trial reflected a stipulation among the parties that the cost for installation of the baffles was \$125,000, but after further review of the relevant financial records it was determined that the actual replacement cost was \$75,820.57.

the coke ovens conditioned on there being no intervening “land disposal” of the material. *See* 40 C.F.R. § 261.4(a)(10). Again, contrary to any suggestion that Tonawanda Coke was merely disposing hazardous waste, the evidence at trial showed that Tonawanda Coke explained to the NYS DEC inspectors that the Company was going to recycle the coal tar sludge left on the property by the prior owner in the same manner Tonawanda Coke had been recycling coal tar sludge generated from the coking process.

Remediating the coal tar in the area around the Barrett Tanks, which formed the basis for Count 17, took more time to address, but Tonawanda Coke again demonstrated its commitment to work cooperatively with regulators. Under the oversight of the US EPA, an environmental consulting firm retained by Tonawanda Coke managed the excavation of all of the tar and soil in the vicinity of the Barrett Tanks. In an effort to properly address all of the issues raised by the regulators under RCRA, Tonawanda Coke spent almost \$2.8 million to fully remediate an area on its property the size of three football fields. Separate and distinct from remediating the area surrounding the Barrett Tanks, Tonawanda Coke installed a trench surrounding the coal field, including several settling ponds at the cost of \$850,000 to more carefully control stormwater runoff.

Finally, as part of its ongoing efforts to address the largely aesthetic concerns raised by the NYS DEC and the US EPA, Tonawanda Coke voluntarily agreed to modify its operations by developing a new technique (ammonia dephlegmator) for managing ammonia gas at a cost of \$500,000. This prototype was ultimately unsuccessful and therefore another \$1.5 million was spent to install a new ammonia still, which pipes the ammonia gas directly to the boiler rather than venting it to the atmosphere. Tonawanda Coke also installed a PLC Hub system and an LBA/LGA piping system, all at a cost of more than \$700,000, to improve the control of the

complex coke oven gas system. In addition, under NYS DEC/US EPA oversight, Tonawanda Coke made numerous other modifications and improvements, including involving outside environmental regulatory counsel in developing its remediation plan, all designed to further improve its environmental compliance systems.⁸

III. **FINANCIAL ABILITY TO PAY A FINE IN THIS CASE**

In determining an appropriate sentence for a corporation, especially a company such as Tonawanda Coke which is committed to rehabilitation, this Court should, pursuant to 18 U.S.C. § 3572(a), consider, among other things, the company's "income, earning capacity, and financial resources," "the burden that the fine will impose" on the company and "any person who is financially dependent on the" company, such as its employees. *See also United States v. Patient Transfer Serv.*, 465 F.3d 826, 827 (8th Cir. 2006) ("A defendant's financial condition must be considered in determining the amount of a fine;" affirming, after a resentencing hearing, that a company (which was found not to be a "criminal purpose organization") with a net worth of \$1 million and annual net income of \$200,000 had the ability to pay a \$500,000 fine in quarterly installments of \$25,000 over the course of five years).

In paragraphs 103 through 117 of the PSR, the probation officer accurately summarizes the financial history of Tonawanda Coke. However, due to the general economic recession and downturn in the coke industry, Tonawanda Coke's present financial and future financial condition is not as certain. Today, Tonawanda Coke operates at an historic low production rate

⁸Rather than continuing to rely solely on outside consultants, Tonawanda Coke has been attempting and is continuing its efforts to identify an individual with the background and experience to lead its environmental compliance program in the future. Until then, Tonawanda Coke is committed to following the recommendations of its environmental counsel and outside consultants.

of 45 percent capacity.⁹ While for the tax year ended June 30, 2012, Tonawanda Coke earned net income after taxes of approximately \$4 million, its net income for the year ended June 30, 2013 was only \$1.2 million, and it expects that net income will remain in the \$1 million range over the next several years. Also, while the book value of the Company's net assets were valued at approximately \$41.5 million for year ending June 30, 2012, total assets for the year ended June 30, 2013 were reduced to \$36.8 million, largely as a result of a reduction in inventory. In addition, the bulk of the assets relate to the Company's property, plant, equipment and inventory, and, absent a liquidation of the Company's assets, would not assist the Company in its ability to pay a fine. Moreover, if there were to be a liquidation under these circumstances, the Company would not recover anything remotely close the full book value of these assets.

This is not to say that Tonawanda Coke does not have the resources to pay an appropriate fine in this case. In fact, to assist the Court in determining Tonawanda Coke's ability to pay, the Company retained an expert financial analyst who prepared a comprehensive report analyzing the historical and prospective financial condition of Tonawanda Coke to determine the Company's ability to pay. *See* Report of Stephen J. Scherf, CPA of Asterion, Inc., dated September 13, 2013 (Exhibit 6). As Mr. Scherf explains in his report, based on the current and projected domestic and international market conditions and industry factors, the Company is likely to continue to experience declining revenues and cash flows over the next two years.¹⁰

⁹ The current economic downturn has had a significant negative impact on this very mature industry. The demand for coke has shrunk as vehicle production has gone down and manufacturing has shifted to a greater use of plastics and lighter steel. Similarly, given the significant pressures on municipal budgets, the demand for sewers and municipal castings has diminished. Over the past four years, Tonawanda Coke had been operating on average at only 56% capacity, and is currently operating at 45% capacity, the lowest production rate in the company's history.

¹⁰ While there were 18 foundry coke manufacturers in North America 25 years ago, there are now only four. If a criminal fine were imposed that exceeded the Company's ability to pay

According to Mr. Scherf, in order for Tonawanda Coke to have sufficient reserves to maintain its operations and continue to employ more than 100 workers at its facility, the Company could not afford to pay more than \$1,000,000 per year over the next two years to satisfy a criminal fine.¹¹

While Mr. Scherf's opinion is time-limited based on the available financial data, there is no evidence to indicate that the poor market conditions he describes as the basis for his opinion will improve significantly within the next five years.

IV. SENTENCING FACTORS

As the PSR notes at ¶ 57, Chapter 8 of the Federal Sentencing Guidelines Manual, which generally is used to set a guideline range for fines against organizational defendants, "do[es] not apply because the count for which the applicable guideline offense level determined is found in §2Q1.2." Generally, environmental crimes committed by corporations are not subject to the Sentencing Guidelines. It does not follow, however, that the guidelines should be disregarded for all purposes. To the contrary, the guidelines and policy statements of the Sentencing Commission ought to be considered to provide context to any sentence. Indeed, 18 U.S.C. § 3553(b)(1), which controls sentencing, explicitly states: "In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission."

resulting in the inability of the Company to continue as a going concern, the elimination of one of the four remaining coke suppliers would likely result in a substantial shortage of coke production capacity, causing a devastating impact on the ability of customers to obtain the foundry coke which is necessary for their manufacturing activities.

¹¹ If it would be of assistance to the Court, Tonawanda Coke is willing to make Mr. Scherf available at the sentencing hearing to testify regarding his analysis and conclusions, and to respond to any questions the Court may have regarding these issues.

Here, there is a guideline – U.S.S.G. § 2Q1.2 – applicable to individuals who mishandle hazardous or toxic substances. Tonawanda Coke understands that the government and the Probation Department believe that, under this guideline, the offense level for the counts of conviction in this case should be calculated as follows: base offense level of 8; a 6 level increase for repetitive discharge; and a 4 level increase because the offense involved a violation of a permit.¹² Based on a total offense level of 18 (resulting in a base fine of \$350,000) and a culpability score of 7 (based on an enhancement under U.S.S.G. § 8C2.5(b)(4)), a Chapter Eight guideline fine range would have been from \$490,000 to \$980,000.

While “a district court [ordinarily] should begin all sentencing proceedings by correctly calculating the applicable Guidelines range,” the guidelines – if the Court chooses to consider them in this case – are merely the “starting point and the initial benchmark” *Gall v. United States*, 552 U.S. 38, 128 S. Ct. 586, 596 (2007). Rather, the Court must “consider all of the § 3553(a) factors” and “must make an individualized assessment based on the facts presented.” *Gall*, 128 S. Ct. at 596-97. In doing so, the Court should take account of all of the mitigating circumstances in this case, including those set forth in this memorandum, to arrive at a sentence that is “sufficient, but not greater than necessary, to comply with the purposes” of sentencing. *See* 18 U.S.C. § 3553(a); *see also United States v. Olhovsky*, 562 F.3d 530 (3d Cir. 2009) (remanding for resentencing; though the sentencing court varied downward from the Guidelines,

¹² Tonawanda Coke understands that the government and Probation Department contend that certain Role in the Offense and Obstruction of Justice enhancements are applicable to the offense level calculation for Mark Kamholz, but those enhancements would not be applicable to a guidelines calculation for the Company. Tonawanda Coke further understands that it is Mr. Kamholz’s position that the appropriate offense level for this case is substantially lower than is suggested by these calculations. The higher offense level is utilized here solely for the purpose of illustrating what the highest fine calculation would be for these offenses under the Chapter Eight guidelines’ fine range.

it was insufficient to meet the “overarching” statutory “parsimony” requirement, and the resulting below-Guideline sentence was too harsh and substantively unreasonable).

A. Nature and Seriousness of the Offense: Sections 3553(a)(1) and 3553(a)(2)(a)

Tonawanda Coke does not dispute that environmental crimes, such as the ones for which it was convicted, are serious offenses. However, as discussed above, given its prior positive working relationship with the NYS DEC inspectors and its commitment to compliance, the offenses for which Tonawanda Coke was convicted do not warrant a “corporate death penalty” as the government may suggest. Tonawanda Coke certainly recognizes that the CAA and RCRA are important statutes designed to regulate emissions into the environment and prevent the improper treatment, storage, or disposal of hazardous waste. The Company accepts full responsibility for the conduct that led to the offenses of conviction.

However, the nature and seriousness of environmental offenses vary widely depending on a number of factors, including the regulatory context of the offense, the nature of the conduct giving rise to the offense, the presence or absence of related culpable conduct, and the environmental harm, if any, that resulted from the conduct. *See, e.g.*, USSG §§ 2Q1.2-1.4 (2012). For this reason, Tonawanda Coke respectfully requests that the Court receive and consider the testimony of two expert witnesses to address the nature and seriousness of the offenses of conviction in this case.¹³

Specifically, with respect to the RCRA offenses, Stephen Johnson is prepared to offer his opinions and explain the bases for his opinions that this case is atypical from most environmental criminal enforcement matters because most criminal enforcement cases are pursued following a history of failed administrative or civil enforcement efforts to achieve compliance. In this case,

¹³ The resumes of the two proposed expert witnesses are attached hereto as Exhibits 7 and 8.

for 20 years prior to the filing of criminal charges, the NYS DEC inspectors had concluded that the facility was complying with the applicable regulatory requirements. Mr. Johnson also will testify that an evaluation of the available data regarding actual or potential environmental harm in this case does not indicate that the plant's management of decanter tank tar sludge made any significant contribution to any environmental harm at or around the plant.

With respect to the CAA offenses, Tonawanda Coke proffers the testimony of John Holmes, who is prepared to offer his opinions and explain the bases for his opinions that CAA regulation and inspections for coke oven plants focus primarily on the coke oven batteries because it is understood to be the primary source for the emission of hazardous air pollutants ("HAPs"). This is confirmed by the history of regulatory oversight of the Tonawanda Coke facility. With respect to the PRV, the facts of this case show that the emission of HAPs from the PRV would have been low, at least until the light oil recovery system was taken off-line in November 2008. Lastly, he will offer his opinion that quench tower baffles are an insignificant control device that are marginally effective only as to large particulate matter, which is understood to be a less significant health threat than small particulates.

Significantly, information recently obtained by Tonawanda Coke's outside environmental regulatory counsel from the NYS DEC through a Freedom of Information Law request appears to demonstrate empirically that the releases from the PRV did not contribute in any measurable way to benzene emissions from the Tonawanda Coke facility. In May 2013, Tonawanda Coke's outside environmental regulatory counsel obtained the air monitoring data collected by NYS DEC during the Tonawanda Community Air Study.¹⁴ Undersigned counsel requested Conestoga-Rovers & Associates ("CRA") to review the air emissions data related to

¹⁴ The government did not produce these data to the Defendants during discovery in connection with the criminal case.

two particular events in the by-products department at the Tonawanda Coke facility that would have been expected to have a measurable effect on benzene emissions from the plant, if the PRV were a significant source of benzene emissions. CRA has completed its analysis of that data and has produced a report of its findings. *See* Letter from Thomas W. Ferrara to Gregory F. Linsin dated September 13, 2013 (Exhibit 9). The first event studied was the shutdown of the light oil recovery process (which had removed benzene, toluene and xylene from the coke oven gas immediately upstream of the PRV) on November 20, 2008. The second event was the permanent capping of the PRV on March 15, 2010. The CRA analysis of the air monitoring data surrounding these two events demonstrates that neither of these events had “any discernible impact on the benzene concentrations observed downwind of the facility.” *Id.* at p. 3. The measured benzene concentrations downwind of the facility did not increase when the light oil recovery system was shutdown in 2008, and the benzene emissions did not decrease when the PRV was capped permanently in 2010.¹⁵ Thus, contrary to the inflammatory arguments advanced by the government throughout the trial, the empirical data appear to indicate that, in fact, the PRV was not a significant source of benzene emissions from the Tonawanda Coke facility. Tonawanda Coke submits that this information too is relevant to the Court’s assessment of the seriousness of the offenses related to the unpermitted discharges from the PRV (Counts 1 through 5).

As this Court is aware, not only has Tonawanda Coke faced this criminal prosecution, the Company also faced extensive parallel administrative and civil enforcement actions initiated by the US EPA in 2009, many of which address the conditions or practices that were the bases for

¹⁵ The CRA report also notes that it cannot account for potential actions by other contributing sources in the immediate vicinity of the Tonawanda Coke facility, which include within a two mile radius two petroleum distribution facilities, multiple chemical bulk storage terminals, a coal burning power plant, a tire manufacturing plant, and two interstate highways.

many of the counts of conviction.¹⁶ While criminal and civil enforcement mechanisms are generally designed as a matter of policy to address distinct enforcement interests, where, as in this case, there is such extensive overlap between the administrative, civil and criminal enforcement actions, it is appropriate to acknowledge that many of the enforcement policy interests already have been vindicated by the extensive civil and administrative enforcement actions and the associated compliance orders.

B. History and Characteristics of the Offender: Section 3553(a)(1)

Tonawanda Coke's presence in the Erie County region as a substantial employer, its history of environmental compliance as explained above, and its commitment to ensuring such compliance going forward, all weigh in favor of a mitigated sentence in this case. During its more than 35 years in operation, Tonawanda Coke has endeavored to maintain a record of environmental compliance. Throughout this time, Tonawanda Coke worked cooperatively and responsibly with the NYS DEC inspectors who visited the facility. As proof of this long, cooperative relationship, prior to 2009, the Company received only five compliance orders and notices of violation regarding environmental deficiencies. Tonawanda Coke promptly corrected each of those deficiencies to the satisfaction of the NYS DEC inspectors.

Beginning in 2009, however, a drastic shift in the regulatory oversight procedures occurred as the US EPA became more directly involved in the inspection of the Tonawanda Coke facility. Tonawanda Coke acknowledges that, in hindsight, additional steps could have been taken by the Company prior to 2009 to enhance and strengthen its environmental compliance program. This recognition has contributed to a series of decisions made by the Company since 2009, including decisions to augment its internal environmental compliance

¹⁶ See Exhibit 2 at ¶¶ 23-33, summarizing the numerous parallel administrative enforcement actions, proceedings and on-going settlement discussions.

practices, to involve outside environmental regulatory counsel in the oversight of environmental compliance practices at the plant, and to identify new leadership for environmental compliance within the Company. In addition, the Company has expended substantial funds to fully satisfy the various compliance orders and notices of violation filed in 2009. The Company also has made funds available to resolve outstanding US EPA requests for facility and operating modifications. These efforts demonstrate Tonawanda Coke's commitment to corrective actions and compliance going forward, and this Court is encouraged to consider as a mitigating factor all of these measures taken to prevent recurrence of the offenses in this case in determining an appropriate fine under 18 U.S.C. § 3572(a)(8).

C. The Need for the Sentence Imposed: Section 3553(a)(2)

Tonawanda Coke recognizes that one of the factors that this Court must consider is the deterrence value of its sentence. As this Court knows, the prosecution of Tonawanda Coke has received a substantial amount of media attention before, during and after trial. Upon information and belief, the enforcement efforts of the Department of Justice and the US EPA in this case have caused many industrial plants, in this region and elsewhere, to reassess and revise compliance practices and procedures with respect to CAA and RCRA compliance.

Certainly, a fair and just sentence that allows Tonawanda Coke to continue its operations will provide further general deterrence and promote respect for the law within the coke industry and among companies nationwide whose activities are governed by the CAA and/or RCRA. Conversely, the imposition of a substantial, disproportionate criminal fine that could jeopardize the ability of Tonawanda Coke to remain a going concern could easily have an adverse effect across the regulated community. Rather than providing general deterrence with respect to future criminal conduct, such a penalty could dissuade responsible companies from working

cooperatively with their local, state and federal regulators for fear that any violation will result in extraordinary penalties.

Regarding the need to deter Tonawanda Coke from future violations, as described throughout this memorandum and in the PSR, Tonawanda Coke has taken substantial actions to enhance and strengthen its environmental compliance program generally, and specifically with respect to emission controls and its practices regarding the management of coal tar sludge at the facility. As detailed in the Declaration of Rick W. Kennedy (Exhibit 2 at ¶¶ 23-33, and Exhibit A attached thereto), since 2009, Tonawanda Coke has responded to and complied with numerous parallel Requests for Information, Notices of Violation, and Administrative Compliance Orders filed by the US EPA, the NYS DEC and the Town of Tonawanda. Tonawanda Coke has also entered into parallel Consent Agreement and Final Orders with the US EPA and the NYS DEC to undertake significant projects for various aspects of the facility and its operations. Moreover, Tonawanda Coke has enlisted the assistance of outside environmental regulatory counsel to oversee the daily management of environmental compliance matters. In addition, the Company has significantly strengthened its environmental compliance program to ensure that appropriate training and compliance oversight is built into the operation and management of the Company going forward.¹⁷

¹⁷ The measures recently taken by the Company to improve its environmental compliance program include: third-party training of key personnel for Hazardous Waste Operations and Emergency Response and Spill Prevention Control and Countermeasures (“SPCC”); update of the facility’s SPCC plan by an outside consultant and approved by an independent environmental engineer; the development and implementation of a site-wide best management practices plan for stormwater and petroleum-related issues; the development and implementation of a site-wide coke oven gas leak survey and repair program developed in conjunction with US EPA and NYS DEC which is in addition to the required environmental monitoring under applicable statutes and regulations; the implementation of a documented preventive maintenance program for the coke oven gas handling and transfer system; the development and implementation of standard operating procedures for enhanced mandatory operator training for all personnel involved in the

D. The Need to Avoid Unwarranted Sentencing Disparities: Section 3553(a)(6)

Especially in a case where there is no explicit sentencing guideline to ensure consistency and fair treatment among similarly situated defendants, this Court should consider other penalties imposed in environmental cases so that defendants with similar backgrounds who have been found guilty of similar offenses receive similar sentences. *See, e.g., United States v. Cavera*, 550 F.3d 180, 188-89 (2d Cir. 2008) (noting that a sentencing judge is directed to consider “the need to avoid unwarranted sentence disparities among similarly situated defendants”); 28 U.S.C. § 991(b)(1)(B) (purposes of Guidelines-based sentencing include “avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct”).

Pursuant to 18 U.S.C. § 3571(c)(3), the statutory maximum fine for each of the counts for which Tonawanda Coke was convicted under the CAA is \$500,000. Accordingly, in the aggregate, the maximum fine amount for Tonawanda Coke as to the 11 counts of conviction related to the CAA is \$5.5 million. As to the offenses of conviction pertaining to RCRA permitting violations, pursuant to 42 U.S.C. § 6928(d)(7)(B), the statutory maximum fine for each count is \$50,000 for each day of violation. The jury’s verdict included a determination of the number of days that Tonawanda Coke violated RCRA permitting requirements for each of Counts 17, 18 and 19. There is no mandatory minimum fine for any of the counts of conviction.

To assist the Court in its determination of an appropriate fine with respect to Tonawanda Coke, we have researched fine amounts resulting from convictions for violations of CAA or

operation of the coke oven gas handling and transfer system; the installation of a programmable logic control hub to manage and monitor the plant’s critical processes; and the establishment of a written mechanical integrity program related to critical operating components.

RCRA against organizational defendants. We have found only two other cases involving a conviction for violation of Title V of the CAA since it was enacted in 1990.

In 2011, Pelican Refining Company pleaded guilty in the Western District of Louisiana to two counts of violating its Title V operating permit and to one count of obstruction of justice. These violations included non-compliance with requirements under the operating permit to use certain pollution prevention equipment, the absence of a pilot light for an emergency flare used to burn off toxic gases and provide for safe combustion of chemicals, improper functioning of a continuous emission monitoring system, and the submission of materially false deviation reports to the Louisiana Department of Environmental Quality. Pursuant to the plea agreement, Pelican Refining agreed to pay \$10 million in criminal penalties (in installments of \$2 million per year over five years) plus \$2 million in community service payments earmarked for various environmental projects in Louisiana, including air pollution monitoring. *See United States v. Pelican Refining Co., LLC*, No. 2:11-cr-00227 (W.D. La. 2011).

In 2009, a jury convicted Atlantic States Cast Iron Pipe Company of violating the CAA stemming from the company's conduct in causing emissions of carbon dioxide by burning more than 55 gallons per day of waste in an industrial furnace in violation of the company's Title V operating permit, exposing its workers to dangerous conditions in violation of Occupational Safety and Health Administration regulations, and impeding and obstructing federal regulatory and criminal investigations through, among other things, making false statements. As a result of these convictions, the district court sentenced the company to an \$8 million fine payable during the course of 48 months probation with a court appointed monitor. *See United States v. Atlantic States Cast Iron Pipe Co.*, No. 3:03-CR-00852 (D. N.J. 2009).

With respect to organizational defendants charged with violating RCRA permitting requirements, in 2011, Honeywell International pleaded guilty to knowingly storing hazardous waste without a permit. Honeywell's conviction stemmed from unlawfully storing nearly 7,500 55-gallon drums at a uranium conversion facility containing corrosive hazardous waste from in or about April 2001 to in or about July 2008. The plea agreement resulted in a fine of \$11.8 million, five years of probation and compliance with a consent order to remediate and process the hazardous waste. *See United States v. Honeywell Int'l, Inc.*, No. 4:11-cr-40006 (S.D. Ill. 2011).

In 2010, Lake Road Warehouse Co. pleaded guilty in the Western District of Missouri to violating RCRA permitting requirements. The factual basis for the conviction was that the company had stored large quantities of hazardous waste chemicals and solvents in out-of-date, unlabeled and damaged containers. In consideration of the company's limited financial capabilities and its expenditure of approximately \$540,000 to remediate, the court accepted the parties' agreement that no fine would be imposed on the company. *See United States v. Lake Road Warehouse Co.*, No. 10-00274-01-CR (W.D. Mo. 2010).

All of these environmental crimes cases illustrate a number of important facts relevant to the determination of the sentence in the instant case. The fines ultimately imposed in these cases were less than the statutory maximum fines. In all of the cases summarized above, the fine amounts imposed also reflected the respective companies' financial resources. The sentences also fairly reflected the relative egregiousness and magnitude of the crime, including whether there were deaths and/or personnel injuries involved.

Given Tonawanda Coke's limited available financial resources, its presence in the region as a substantial employer, its history of cooperative relations with the NYS DEC, the lack of

environmental harm resulting from the offenses, and the Company's good faith efforts pre-indictment, post-indictment and post-conviction to resolve all outstanding environmental issues at its facility, Tonawanda Coke urges the Court to impose a fine substantially lower than the statutory maximum allowed under 18 U.S.C. § 3571 and 42 U.S.C. § 6928(d)(7)(B).

E. Terms and Conditions of Probation

1. *Restitution to Victims*

An order for restitution as a condition of probation under USSG § 8 B1.1 or 18 U.S.C. § 3563(b)(2) is not warranted by the facts of this case. Sentencing Guideline § 8B1.1 directs the court to enter a restitution order for the full amount of the victim's loss "in the case of an identifiable victim." 18 U.S.C. § 3563(b)(2) also permits the court to order restitution as a discretionary condition of probation to "the victims of the offense," defined as a "person directly and proximately harmed as a result of the commission of an offense." *See* 18 U.S.C. § 3663(a)(2).

In the instant case, the government did not identify at trial or in post-conviction submissions to the Court, any persons directly or proximately harmed as a result of Defendants' offense conduct. Indeed, Paragraph 53 of the PSR states that "the instant offense is not a property offense and did not involve victim injury or loss." *See* PSR at ¶ 53. The government has not objected to this statement. Accordingly, an order of restitution is not warranted as a condition of probation to be imposed by the Court in this case.¹⁸

¹⁸ In Tonawanda Coke's view, the basis for an order of restitution as a special condition of probation is not present in this case, as no victim of the offensive conduct have been identified or alleged. Even if it were alleged that persons were somehow harmed by the offense conduct, Tonawanda Coke notes that the process of identifying individuals harmed by a defendant's violation of the environmental statutes would require those individuals to prepare victim impact statements, which can be a complex and time-consuming process that would serve to significantly delay sentencing. *See, e.g., United States v. CITGO Petroleum Corp.*, No. C-06-

2. Remedial Orders

Pursuant to Sentencing Guideline § 8B1.2, the Court has the authority to enter a remedial order requiring an organization as a condition of probation “to remedy harm caused by the offense and to eliminate or reduce the risk that the instant offense will cause future harm.” *See* USSG § 8B1.2. Tonawanda Coke asserts that such a condition of probation is unnecessary in this case, as it would have the effect of duplicating requirements which the Company has already addressed in compliance with numerous administrative and civil compliance orders entered by the NYS DEC and the US EPA, including certain actions which have been taken voluntarily by the Company. Likewise, such an order would – in effect – result in this Court second-guessing the substantial amount of environmental oversight already exercised by regulatory agencies with respect to the need for environmental investigation and/or remediation at the Tonawanda Coke facility for the past 32 years. *See* Exhibit 2 at ¶¶ 12–22 and 27–30.

There were a number of prior administrative and civil compliance orders related to potential historic contamination at the Tonawanda Coke site. From December 1986 through August 2005, Tonawanda Coke conducted a series of investigations, at the direction of the NYS DEC, to analyze potential contamination at its facility from the historic placement of fill and waste material in discrete localized areas by prior historic owners of the site as part of the agency’s investigation into Inactive Hazardous Waste Disposal Sites on the Niagara River. Tonawanda Coke voluntarily agreed to undertake its overall investigation on a more significant scale than required by NYS DEC, and to undertake appropriate remediation efforts, as necessary. During the course of this nearly two-decade period, Tonawanda Coke conducted four major

563 (S.D. Tex.) (sentencing remains pending more than five years after defendant company’s conviction for two counts of violating the CAA).

investigations, collected over 100 samples of groundwater, surface water, composite soil and sediment, and installed approximately 20 groundwater monitoring wells, including around the perimeter of the coal fields. Notably, these investigations tested for the concentration of benzene in the soils, surface water and groundwater located at the facility, and identified three localized areas of contamination from the historic disposal of fill and waste material by the prior historic owners of the site, which were subsequently designated as operable units by NYS DEC requiring remediation.

The findings of an August 2005 review, which were summarized along with the findings of the earlier investigations in a final supplemental report to the NYS DEC in January 2008, found that neither the groundwater leaving the Tonawanda Coke facility, nor the surface water traversing Tonawanda Coke and discharging into the Niagara River, was contaminated.¹⁹ Some minor contamination in the surface soil was found at the facility, but such contamination was attributed to semi-volatile organic compounds, (which do not include benzene), and are believed to be historic in nature. Tonawanda Coke conducted a detailed feasibility study, and entered into a remediation plan with the NYS DEC, to remediate the localized contamination identified in the three operable units, which it subsequently undertook to the satisfaction of the NYS DEC. Tonawanda Coke has completed all necessary work in two of the three operable units, as documented by a Record of Decision from NYS DEC, and is in discussions to finalize the details for the remedial plan to address the last remaining area. *Id.* at ¶¶ 16 – 22.

¹⁹ A native clay glaciolacustrine deposit is present below general fill soil across the entire Tonawanda Coke facility, which acts as an aquitard due to its impervious nature. The exact thickness of the clay varies across the site, but in some areas, it has been estimated to be present at a thickness of more than 50 feet in depth, which makes it highly unlikely any on-site activities would have affected the quality of any permanent groundwater beneath the facility. Any water present on-site would be on the surface, or perched, if present. *See* Exhibit 2 at ¶ 20.

The prior investigations at the Tonawanda Coke facility did not identify benzene contamination in the coal fields, and because of that fact, the NYS DEC did not request Tonawanda Coke to conduct any further assessment of potential contamination of the coal fields.²⁰ Moreover, while both the NYS DEC and the US EPA have had knowledge of the conduct underlying the offenses of conviction with regard to the coal field area since at least 2009, neither regulatory agency has requested the Company to conduct any further assessment of potential contamination in, below, or around the coal field area. However, this fact is not meant to suggest that the agencies have overlooked the issue of potential contamination issues associated with the coal fields. In fact, the US EPA exercised its regulatory oversight authority to issue an administrative compliance order in December 2009 requiring Tonawanda Coke to eliminate coal pile runoff of K087 material into the facility's stormwater system discharges. *Id.* at ¶ 27. Tonawanda Coke fully complied with this order by engaging qualified environmental professionals to review on-site operations, develop a detailed plan, implement it after US EPA approval (including significant on-site upgrades in the coal field storage area and the associated stormwater retention pond system), and finalize a best management practices plan for long term compliance. All the aforementioned actions were overseen, and certified by, the US EPA. *Id.*

Tonawanda Coke has also fully satisfied the requirements of a RCRA Complaint filed by the US EPA with respect to the excavation and removal of tar-like material in the vicinity of the

²⁰ See Exhibit 2 at ¶ 21. Analytical results for soil in the coal storage area identified no benzene contamination. Three downgradient monitoring wells at Tonawanda Coke were used to evaluate the potential impacts on the groundwater resulting from the coal storage area. With regard to benzene, only one sample in December 1989 was identified above NYS DEC's maximum contaminant level ("MCL") at the time, and that result was below Sanitary Code Part 5 drinking water standards. Cyanide was the only other constituent identified in excess of MCL in October 1989 and December 1989, but was deemed to be from an adjacent off-site source, and therefore, required no further action by Tonawanda Coke. *See id.*

former Barrett Tank area at the facility as previously mentioned. *Id.* at ¶¶ 28 – 30. On June 15, 2012, Tonawanda Coke submitted a final report to the US EPA documenting compliance with the requirements of the Consent Agreement and Final Order which embodied these remediation requirements, including identifying the fact that Tonawanda Coke has remediated an area 18 times larger than originally identified by US EPA based on pre-project modeling estimates, and areas which appear to be associated with the historic operation of the site prior to Tonawanda Coke's ownership. *Id.* at ¶¶ 29-30.

In Tonawanda Coke's view, the US EPA and the NYS DEC, consistent with their regulatory authority, have already properly exercised their regulatory oversight and judgment with regard to the potential for contamination emanating from, or runoff flowing from, the coal field area, and the need for removal of tar-like material from the area of the former Barrett Tank area. Tonawanda Coke has complied fully with the requirements of the administrative orders regarding the remediation of these areas of the facility, and has documented that compliance to the satisfaction of the regulatory agencies. Accordingly, in view of the extensive parallel administrative proceedings related to the issue of remediation of the coal field, and the area around the former Barrett Tank location, there is no need for this Court to enter a remedial order for the investigation and/or remediation of those areas as a special condition of probation in this case.

3. *Community Service Payment*

Under Sentencing Guideline § 8B1.3, the Court may order community service as a condition of probation "where such community service is *reasonably designed to repair the harm caused by the offense.*" USSG Manual § 8B1.3 (emphasis added). However, in this case the Indictment did not allege any harm, and there was no evidence introduced at trial showing

that any specific harm was caused by the offenses of conviction. In fact, the parties stipulated prior to trial that evidence of environmental harm was inadmissible at trial. (Docket No. 138, p. 4) Moreover, as noted previously, the PSR states that “the instant offense is not a property offense and did not involve victim injury or loss.” *See* PSR at ¶ 53. For these reasons, there is no factual basis in this case for the Court to impose a community service payment for the purpose of repairing the harm caused by the offenses of conviction.²¹

In addition to § 8B1.3 of the Sentencing Guidelines, 18 U.S.C. § 3563(b)(12) provides the Court with discretion to impose as a condition of probation “work in community service,” so long as such a condition is “reasonably related” to the factors set forth in 18 U.S.C. §§ 3553(a)(1) and (a)(2) and to the extent that it is “reasonably necessary” for the purposes indicated in section 3553(a)(2).²² 18 U.S.C. § 3563(b)(12). As discussed, *supra*, none of the factors set forth in 18 U.S.C. §§ 3553(a)(1) and (a)(2) support the imposition of community service payments as a condition of probation. Many of the enforcement policy interests

²¹ There are currently 20 tort actions pending against Tonawanda Coke and certain individuals associated with the Company based on claims related to the operation of the Tonawanda Coke facility. There is also a class action sounding in tort that covers all of the remaining potential plaintiffs in the communities surrounding the facility. These actions are pending in Erie County Supreme Court and are currently in the middle of the discovery process. *See* Exhibit 2 at ¶¶ 34 – 41. Tonawanda Coke respectfully submits that these lawsuits are the proper forums to adjudicate claims regarding harm that may have been caused by Tonawanda Coke’s operations.

²² In *United States v. CITGO Petroleum Corp.*, Case No. C-06-563, 2012 WL 4127800 (S.D. Tex. Sep. 18, 2012), the government argued that the discharge of “work in community service” under 18 U.S.C. § 3563(b)(12) includes payment of funds to charities so that those organizations may perform work in community service on the defendant company’s behalf. Without deciding this specific issue, the court noted that Commentary to the Policy Statement under USSG § 8B1.3 acknowledged that an order that an organization perform community service is essentially “an indirect monetary sanction.” USSG §8B1.3. Accordingly, the court held, based on the Supreme Court’s decision in *Southern Union Co. v. United States*, 132 S. Ct. 2344 (2012), that when coupled with any other fine imposed by the court, payments to charities for community service may not exceed the maximum statutory fine. *CITGO*, 2012 WL 4127800 at *3, *aff’d*, *United States v. CITGO Petroleum Corp.*, 908 F. Supp. 2d 812 (S.D. Tex. 2012).

underlying the offenses of conviction have been vindicated by the extensive civil and administrative orders and enforcement actions against the Company. Since 2009, the Company has expended substantial funds, and made additional funds available, to fully satisfy the various Compliance Orders and Notices of Violation filed against it and to resolve outstanding US EPA requests for facility and operating modifications. Moreover, as a substantial employer in Erie County, Tonawanda Coke has demonstrated its commitment to the region's economy. Finally, in Tonawanda Coke's view, none of the factors enumerated in 18 U.S.C. § 3553(a)(2), support the necessity of imposing a community service payment as a condition of probation. A community service payment is not necessary to reflect the seriousness of the offense, to afford adequate deterrence to future environmental crimes or to protect the public from Tonawanda Coke engaging in hypothetical future criminal conduct. Accordingly, the threshold for imposing a community service obligation on the company is not satisfied under 18 U.S.C. § 3563(b)(12).

4. *Other Terms of Probation*

In view of all of the Company's actions to accept responsibility, address on-site concerns, and improve its overall environmental compliance, Tonawanda Coke urges the Court to impose a minimum length of probation, and to decline to impose other discretionary conditions of probation pursuant to 18 U.S.C. § 3563(b), taking into account the Company's interest in remaining an ongoing viable entity. In this regard, Tonawanda Coke particularly urges the Court to refrain from appointing a monitor to oversee the Company's ongoing compliance efforts given the substantial additional costs arising from such a monitorship. Moreover, given the heightened level of scrutiny by the NYS DEC and the US EPA inspectors as a result of this case, the close involvement of the Company's outside environmental regulatory counsel and environmental compliance consultants, and the Company's extensive efforts to ensure regulatory compliance by

remedying areas of concern in a timely and efficient manner, additional oversight for the Company would be duplicative and unnecessary. Tonawanda Coke recognizes that this Court would consider any environmental violations that were to occur during a period of probation to be a very serious matter with very serious consequences, and is committed to complying fully with its ongoing environmental obligations.

V. **CONCLUSION**

For all of these reasons, Tonawanda Coke respectfully requests that this Court consider all of the mitigating and other factors involved in this case at the sentencing hearing and impose a reasonable fine consistent with the facts detailed in this memorandum. Tonawanda Coke also respectfully requests the Court to impose a limited term of probation without significant special conditions.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of September 2013, I electronically filed the foregoing SENTENCING MEMORANDUM ON BEHALF OF TONAWANDA COKE CORPORATION with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to the following CM/ECF participants on this case:

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